IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 769.

THE SIOUX TRIBE OF INDIANS, *Petitioner*,

v.

THE UNITED STATES.

On Petition for Writ of Certiorari to the Court of Claims.

REPLY BRIEF FOR PETITIONER.

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The petitioner, by counsel, makes the following reply to respondent's brief in opposition.

UNDER THE CAPTION "QUESTIONS PRESENTED."

Respondent has misstated the questions presented. Question No. 1 (Respondent's Brief in Opposition, p. 2) distorts the real question which is set out on page 16 of the petition herein (Question number three). Further the Respondent has misstated Article 12 of the Treaty of April 29, 1868 (15 Stats. 635) in stating that the proposed agree-

ment of 1876 "was not approved by *two-thirds* of the adult male Indians as required by Article 12 of the Treaty (of 1868)."

Article 12 of the Treaty of 1868 requires that *three-fourths* of the adult male Indians of the Sioux Tribe must sign any treaty for the cession of any part of the permanent reservation created by that Treaty.

In respondent's Question No. 2 (Respondent's Brief in Opposition, p. 2) it is stated that "the Indians relinquished all claims to said lands by the agreement of 1889." In that question is respondent's only hope for denial of the writ of certiorari in this case. Therefore this reply.

NO RELINQUISHMENT OF THIS CLAIM EXISTS.

Respondent failed to quote Section 19 of the Act of March 2, 1889 (25 Stat. 888). That section is as follows:

> "Sec. 19. That all the provisions of the said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred sixty eight, and the agreement with the same approved February twenty-eighth, eighteen hundred seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding."

When this section is read in its full text it, conclusively, appears to be in the form and manner of the customary legislative saving clause. Such saving clauses appear in hundreds of amendatory statutes. Section 19, *supra,* does not change the status, the rights nor the obligations of the United States or the Sioux Tribe (or Nation) of Indians. It merely states that the *status quo ante* is maintained except as specifically altered by the terms of the said Act of March 2, 1889. At no other point, in no other words, in the Act of March 2, 1889, is reference made which may in any way be construed as a relinquishment or a release of the pending claim of petitioner. In the words quoted from the

said act by respondent there is not even a remote indication that either the Sioux Indians in the year 1889 or the United States considered Section 19 of that Act as a relinquishment or as a release of the pending action. If a release or relinquishment was intended by the United States, such intention was not disclosed to the Sioux Indians at the time the agreement of March 2, 1889, was presented to the Sioux Indians for their acceptance.

The Court will take judicial notice of the message of President Harrison dated February 10, 1890, which message accompanied the Presidential proclamation, provided for by the Act of March 2, 1889, declaring the said Act to be in full force and effect. That message is set out in Senate Executive Document 51, 51st Congress, 1st session. On pages 1 and 2 of that Executive Document are found the following words:

> "At the outset of the negotiations the Commission was confronted by certain questions as to the interpretation and effect of the act of Congress which they were presenting for the acceptance of the Indians. Upon two or three points of some importance the Commission gave, in response to these inquiries, an interpretation to the law, and it was the law thus explained to them that was accepted by the Indians. The commissioners had no power to bind Congress or the Executive by their construction of a statute, but they were the agents of the United States, first to submit a definite proposition for the acceptance of the Indians, and, that failing, to agree upon modified terms, to be submitted to Congress for ratification. They were dealing with an ignorant and suspicious people, and an explanation of the terms, and effect of the offer submitted could not be avoided. Good faith demands that if the United States accepts the lands ceded, the beneficial construction of the act given by our agents should be also admitted and observed.
>
> "The chief difficulty in the construction of the act grows out of its relation to prior treaties, which were by section 19 continued in force so far as they are not in conflict with the terms of the act. The seventh article of the treaty of 1868, relating to schools and

school-houses, is by section 17 of the act continued in force for twenty years, 'subject to such modifications as Congress shall deem most effective to secure to said Indians equivalent benefits of such education.'

"Section 7 of the treaty of 1868 provides only for instruction in the 'elementary branches of an English education,' while section 17 of the act, after continuing this section of the treaty in force, provides a fund which is to be applied 'for the promotion of industrial and other suitable education among said Indians.' Again, section 7 of the treaty provides for the erection of a schoolhouse for every thirty children who can be induced to attend, while section 20 of the act requires the erection of not less than thirty school-houses, and more if found necessary.

"The Commissioners were asked by the Indians whether the cost of the English schools provided for in section 7 of the treaty, and of the school-houses provided for in the same section, and in section 20 of the act, would be a charge against the proceeds of the lands they were now asked to cede to the United States. This question was answered in the negative, and I think the answer was correct. If the act, without reference to section 7 of the treaty, is to be construed to express the whole duty of the Government towards the Indians in the matter of schools, the extension for twenty years of the provisions of that section is without meaning.

"The assurance given by the commissioners that the money appropriated by section 27 of the act to pay certain bands for the ponies taken by the military authorities in 1876 would not be a charge against the proceeds of the ceded lands was obviously a correct interpretation of the law.

"The Indians were further assured by the commissioners that the amount appropriated for the expenses of the Commission could not under the law be made a charge upon the proceeds of their lands. This I think is a correct exposition of the act.

"It seems from the report of the Commission that some of the Indians at the Standing Rock Agency asked whether, if they accepted the act, they could have the election to take their allotments under section 6 of the treaty of 1868 and have the benefits of sections 8 and 10 of that treaty and were told that they could.

> "As the treaty is continued in force, except where it contravenes, the provisions of the act, I do not see any difficulty in admitting this interpretation."

In submitting to the Congress the "Report and the Proceedings of the Sioux Commission" all of which is set out in the Executive Document above referred to, the President of the United States did not by word or implication suggest that the language in Section 19 of the Act of March 2, 1889, was a relinquishment, a release or an abandonment of the claim of petitioner herein for just compensation for the valuable lands taken from the Sioux Tribe by the Act of February 28, 1877 (19 Stats. 254). It is, therefore, conclusive that neither the United States nor the Sioux Tribe of Indians considered that section (19) of the Act as doing any thing other than leaving the parties exactly where they theretofore were as to rights and obligations, except as specifically altered by the said Act.

The respondent, however, now asserts, as a reason for denying the writ of certiorari, that the eleven words quoted from section 19 of the Act of March 2, 1889, should be, by the Court, regarded as a relinquishment of a valid claim for compensation for the lands which were taken from the 1868 permanent reservation by the Act of February 28, 1877. Nothing has been submitted by respondent in support of that bald assertion.

If this assertion by respondent, lacking the substance, has even the odor of merit, it is in effect the old common law plea of confession and avoidance. Such plea admits that there was a taking of petitioner's lands as claimed in this case and that a relinquishment was intended by both the United States and the Sioux Tribe when they joined in the Agreement which is set out in the Act of March 2, 1889. Such plea may be relied upon for what it is worth by respondent in trial on the merits. It can not be set up as a reason for denial of the writ but is, indirectly, a further reason for the granting of the writ.

The words quoted by respondent and as well the entire section 19 of the Act of March 2, 1889, now quoted by peti-

tioner, do not show that a relinquishment of anything was intended by either the United States or the Sioux Tribe. However, as the respondent evidently relies on those eleven quoted words, it is pertinent here to state how words in treaties and agreements between the United States and Indian tribes should be construed.

CONSTRUCTION OF INDIAN TREATIES AND AGREEMENTS.

In *Jones* v. *Meehan,* 175 U. S. 1, at p. 11, this Court said:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations of the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms on which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."*

By Act of Congress (April 15, 1874) a large area of what is now the state of Montana was set aside for certain

*For the same proposition see: (1) *Northern P. R. Co.* v. *United States,* 227 U. S. 355; (2) *United States* v. *Winans,* 198 U. S. 371; (3) *Blue Jacket* v. *Johnson County,* 5 Wall. 737; (4) *Choctaw Nation* v. *United States,* 119 U. S. 1; (5) *United States* v. *Shoshone Tribe,* 304 U. S. 111.

In a later case, *Winters* v. *United States,* 207 U. S. 564, it appears the following factual situation was under consideration by the Court.

named Indian tribes. Subsequently, the United States for the purpose of opening this land up for settlement, entered into an agreement with the Indians whereby the latter "ceded, sold, transferred, and conveyed" to the United States all the lands embraced in said area except Fort Belknap Reservation. This agreement was subsequently ratified by Act of Congress.

The lands in question are arid lands. Through them, however, runs Milk River, a non-navigable stream. Before the agreement above referred to the Indians had used the waters of Milk River for irrigation purposes. After their removal to Fort Belknap this use was continued and extended, the facts showing that such a use is indispensable for the continued productivity of the land.

Defendants are parties who have settled above Fort Belknap after the agreement above mentioned was entered into. They are now diverting a large portion of the water from Milk River for their own purposes.

Plaintiff, the United States, brings this bill to enjoin the defendants from diverting the water. Defendants' contention is that under the agreement entered into between the United States and the Indians aforementioned, the Indians sold the land on which defendants now reside to the Government and the Indians did not expressly reserve to themselves any water rights. Defendants concede that the Indians had a claim to these rights before the agreement was made, but since they failed to mention it in said agreement, the rights must be considered as waived. The Court held that the argument depended upon the interpretation that was to be given to the agreement and that viewing all the circumstances, defendants' interpretation was unsound. In stating the general rule for construing Indian agreements, the Court said (pp. 576-577):

> "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose

of the agreement and the other impair or defeat it. On account of their relation to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might mitigate against or defeat the declared purpose of themselves and the Government, even of (sic) it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."

CONCLUSION.

From the foregoing it appears:

That the words of Section 19 of the Act of March 2, 1889, do not purport to be a relinquishment of petitioner's pending claim.

That the said section was not construed as a relinquishment of this claim by the President of the United States in 1890.

That no such construction of said section was in the mind of the Sioux Indians, petitioner here, at the time the agreement of March 2, 1889, was ratified by them.

That if there is ambiguity in, or if said section 19 may be otherwise construed, then the words of that section must be construed in the light of the cases cited and quoted from herein.

It is, therefor, submitted that respondent has failed to offer sound objections to the petition herein; that petitioner has shown cause for the granting of the writ and that the writ of certiorari to the Court of Claims should be granted.

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